AMAX EXPLORATION, INC.

IBLA 81-305 Decided October 16, 1981

Appeal from decision of Eastern States Office, Bureau of Land Management, requiring in part execution of stipulation in connection with hardrock prospecting permit applications. ES 18158 and ES 18510.

Vacated and remanded.

1. Mineral Lands: Prospecting Permits

BLM may not properly require an applicant for a hardrock prospecting permit to execute a stipulation that a lease will be issued only upon a showing of a valuable mineral deposit, as a condition precedent to issuance of the permit, where the Secretary has declared that such a standard is not applicable to prospecting permits issued pursuant to sec. 402 of Reorganization Plan No. 3, 60 Stat. 1099.

APPEARANCES: Dorothy J. Gusler, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Amax Exploration, Inc., has appealed from a decision of the Eastern States Office, Bureau of Land Management (BLM), dated December 11, 1980, requiring in part the execution of a stipulation in connection with two hardrock prospecting permit applications, ES 18158 and ES 18510, for certain acquired land within the Nicolet and Chequamegon National Forests. 1/ The disputed language in the stipulation provides:

1/ Application ES 18158 was filed Dec. 5, 1977, with respect to 440 acres (subsequently amended to 360 acres) of land situated in T. 33 N., R. 16 E., fourth principal meridian, Wisconsin. Application ES 18510 was filed Feb. 17, 1978, with respect to 623.92 acres of land situated in T. 33 N., R. 1 E., fourth principal meridian, Wisconsin.

> The authorized officer shall issue a lease to the holder of prospecting permit issued for a hardrock mineral if the permittee shows to the authorized officer that, within the term of the permit, he discovered a valuable deposit of the mineral for which the permit was issued.
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> A permittee has discovered a valuable deposit if the deposit discovered under the permit is of such a character and quantity that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The permittee must present sufficient evidence to show that there is a reasonable expectation that his revenues from the sale of the mineral will exceed his costs of developing the mine, and extracting, removing, and marketing the mineral.

In its statement of reasons for appeal, appellant contends that the Secretary has declared that the standard of a "valuable deposit" is not applicable in the case of hardrock prospecting permits and that a standard would be promulgated pursuant to further rulemaking. Appellant further asserts that to date, no regulations on the subject have been issued. Appellant argues that the matter is inherently suited to rulemaking and should not be accomplished by adjudication, citing SEC v. Chenery Corp., 332 U.S. 194 (1947).

On January 19, 1976, the Department published proposed rules (41 FR 2648) governing the issuance of leases to prospecting permittees. Those rules were intended to include "prospecting permits" for hardrock minerals issued under section 402, Reorganization Plan No. 3, 60 Stat. 1099. The rules proposed that leases be issued only to permittees who had discovered a valuable deposit. A valuable deposit was defined in those rules. Following a comment period, on May 7, 1976, the Secretary issued final regulations applicable to preference right leases. 41 FR 18845 (May 7, 1976). While these regulations appear to apply the "valuable deposit" standard to all applications by prospecting permittees, 2/ the preamble to the final rulemaking states in relevant part:

> 11. Request that the standard of valuable deposit not apply to hardrock prospecting permits. The proposed rulemaking applied not only to prospecting permits issued under the Mineral Leasing Act, but also to permits issued

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2/ The former regulation, 43 CFR 3520.1-1(a)(3) (1975), provided: "Solid (hardrock) minerals. A permittee who discovers any valuable deposits of minerals shall be entitled to a preference right lease for the mineral in any or all of the lands in the permit * * *." See The Hanna Mining Company, 20 IBLA 149 (1975).

> under the authority transferred to the Department of the Interior by Section 402 of the Reorganization Plan No. 3, 60 Stat. 1099. The Department's authority under the Reorganization Plan does not require the Department to use any particular leasing system or standard. In the past, the Department has used the same standard under the Reorganization Plan as it used under the Mineral Leasing Act. Consequently, prospecting permits issued under the Reorganization Plan were included in the proposed rulemaking. However, the Department is presently considering whether to adopt a different system for leasing minerals subject to the Reorganization Plan. Consequently this rulemaking does not include permits issued under the Reorganization Plan. The Department intends to undertake separate rulemaking for minerals leasable under that authority. Comments should be directed to the address listed in the previous response. No proposed date of publication has been established. [Emphasis added.]

41 FR 18847 (May 7, 1976)). 3/ Accordingly, 43 CFR 3520.1-1(c) does not require a showing of a "valuable deposit," as a prerequisite to issuance of a preference right lease to the holder of a hardrock prospecting permit, "issued under the Reorganization Plan." Therefore, BLM may not require execution of a stipulation to that effect where the Secretary, by virtue of the aforementioned rulemaking, has expressly provided that such a standard does not apply. Compare with John W. Jewell, 53 IBLA 179 (1981) (Forest Service stipulation).

The prospecting permits sought by appellant would clearly be "issued under the Reorganization Plan." Section 402 of Reorganization Plan No. 3 of 1946 (60 Stat. 1099) transferred the functions of the Secretary of Agriculture, established under various statutes, including

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3/ On appeal appellant has submitted a copy of a letter from Secretary of the Interior Thomas Kleppe to Representative Richard Ichord, dated May 18, 1976, stating:

"This is in response to your letter of April 21, 1976, concerning our proposed regulations defining 'commercial quantities.'

"Your comments concerning the inclusion of hard rock minerals on acquired lands as part of the proposed regulations in part 3520 of title 43 of the Code of Federal Regulations have also been expressed by a number of others who have commented on the regulations. As a result of these concerns, I have decided to exclude hard rock minerals on acquired lands from the application of these regulations. Consequently, the definition of 'commercial quantities' and 'valuable deposit' which has recently been published in the Federal Register as final rulemaking will not apply to mineral permits issued under the authority transferred to the Department by Section 402 of the Reorganization Plan No. 3, 60 Stat. 1099."

the Act of March 4, 1917, 16 U.S.C. § 520 (1976), to the Secretary of the Interior with respect to uses of mineral deposits on lands acquired by the Department of Agriculture. See 43 CFR 3500.0-3(b)(2)(ii). The Act of March 4, 1917, supra, gave the Secretary of Agriculture authority to issue permits and leases for the prospecting and development of mineral resources in lands acquired for national forests under certain provisions of the Act of March 1, 1911 (otherwise known as the Weeks Act), as amended, 16 U.S.C. §§ 513-519 and 521 (1976). The record indicates that all of the subject land was acquired under the "Weeks Act." See "Title Report Request[s]," signed by Regional Forester, Forest Service, on December 19, 1978, and May 2, 1979. Accordingly, prospecting permits would be issued to appellant under Section 402 of Reorganization Plan No. 3.

While we hold that appellant may not be required to execute the disputed stipulation, we express no opinion upon which basis appellant might in the future become entitled to a preference right lease or as to what standard might then apply.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded to BLM for further action not inconsistent herewith.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge